No. 484 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN FRANCIS NOTO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Motion for Leave to Proceed in Forma Pauperis and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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OCTOBER TERM, 1958

No. 564 Misc.

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UNITED STATES OF AMERICA

On Motion for Leave to Proceed in Forma Pauperis and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES

This is the second conviction under the so-called "membership" clause of the Smith Act (18 U.S.C. 2385) to reach this Court since its decision in *Yates* v. *United States*, 354 U.S. 298, construing and interpreting the "organizing" and "teaching and advocating" clauses of the same Act. On December 15, 1958, the Court granted certiorari in *Scales* v. *United States* (358 U.S. 917), No. 488, this Term, to review a decision

of the Fourth Circuit Court of Appeals affirming a conviction under an indictment similar to that in this case. *Scales* is presently pending before the Court and for the reasons set forth below we respectfully suggest that disposition of this petition be held in abeyance pending a determination in that case.

Petitioner was convicted following a trial by jury in the United States District Court for the Western District of New York and sentenced to five years' imprisonment under an indictment, returned on November 8, 1954. The indictment charged that continuously, since January, 1946, up to the date of its filing, the Communist Party of the United States was a society, group and assembly of persons who taught and advocated the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit and that continuously, during this entire period, petitioner was a member of the Communist Party of the United States with knowledge that it did so teach and advocate and with the intent to bring about such overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

On appeal to the Court of Appeals for the Second Circuit, the judgment of conviction was affirmed on December 31, 1958. In its opinion (Pet. App. A 13-26) the Court of Appeals reviewed the evidence introduced at the trial both with respect to the nature of the Communist Party and with respect to petitioner's personal knowledge of the Party's character (his membership in the Party being conceded) and his intent to bring about its aims and purposes as

speedily as circumstances would permit. The court concluded (*id.* at 19-20) that:

> * * * the Government proved by sufficient evidence that the defendant was an active member in an organization teaching and advocating the violent overthrow of the Government well knowing the aim and purpose of the Party and with intent to achieve its illegal purpose.

It further held that Congress could constitutionally, through enactment of the membership clause of the Smith Act, "proscribe high level, active membership unremittingly devoted and pledged to the accomplishment of" the forcible and violent overthrow of the Government and that the Act had validly been applied to petitioner's membership and activities in the Party (*id.* at 22-23).

In addition, the court below pointed out that the offense of which petitioner was convicted—membership in the Communist Party with knowledge of its illegal aims and purposes and intent to achieve them—is distinct under the Act from the offense of advocating and teaching the duty and necessity of overthrowing the Government by force and violence or of organizing a society or group of persons who so advocate. It accordingly held that the incitement-to-action test laid down by this Court in *Yates* v. *United States*, 354 U.S. 298, for determining whether speech, oral or written, is of the type proscribed by Congress in the Act's "teaching and advocacy" clause, was not required to be applied to the evidence of petitioner's activities which was received at the trial to prove his guilt under the membership clause (*id.* at 24-26).

Petitioner raises five questions in his petition (Pet. 2):

> 1. Whether the court below erred in holding that the incitement-to-action test of advocacy enunciated in *Yates* v. *United States*, 354 U.S. 298, is inapplicable to a prosecution under the membership clause of the Smith Act.
>
> 2. Whether the evidence was sufficient to sustain the conviction.
>
> 3. Whether the conviction was based on evidence which should have been excluded as incompetent, irrelevant, remote and prejudicial.
>
> 4. Whether the immunity conferred by section 4(f) of the Internal Security Act (50 U.S.C. 783 (f)) bars prosecution of the offense charged in the indictment.
>
> 5. Whether the membership clause of the Smith Act is unconstitutional on its face or as applied in this case.

Questions 4 and 5, *supra*, are substantially identical with questions 2 and 1, respectively, in the *Scales* case, *supra* (see *Scales* Petition, p. 2).

Question 2, *supra*, involving the sufficiency of the evidence to sustain the conviction in this case, is closely analogous to question 3 in the *Scales* case (*Scales* Petition, p. 2), involving the sufficiency of the evidence to sustain the conviction in that case. While the evidence is of course not the same in the two cases, the records are closely comparable in this respect.

Question 3, *supra*, involving the admissibility of allegedly "incompetent, irrelevant, remote and prejudicial" evidence, was not urged in the Court of Ap-

peals.[1] If, notwithstanding this fact, this Court should choose to consider this question, we note that it is very similar to question 4, part (A), in the *Scales* case (*Scales* Petition, pp. 2, 24-27), involving the admissibility of allegedly "incompetent, irrelevant, remote and inflammatory" evidence (*id.*, p. 24).

Question 1, *supra*—"[w]hether the court below erred in holding that the incitement-to-action test of advocacy enunciated in *Yates* v. *United States*, 354 U.S. 298, is inapplicable to a prosecution under the membership clause of the Smith Act"—is based, we think, upon a misreading of the opinion below. The Court of Appeals pointed out, correctly, that "[s]ince defendant was not indicted for *activities* the end result of which were to culminate in action on the part of others, it was not necessary that the evidence *of his activities* meet the *Yates* test" (Pet. App. A 26; emphasis added). But this is not to say that the *Yates* test of advocacy is "wholly inapplicable" to a prosecution under the membership clause—as petitioner reads the opinion to hold (Pet. 6). It is concededly neces-

[1] "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16, and cases cited. As in *Lawn*, "[t]here are no exceptional circumstances here" (*ibid.*). Not only was the admission of the evidence now complained of not "plain error"—the usual standard whereby error, not duly presented, will be noticed (cf. Rule 52(b), F.R. Crim. P.; Rule 40(1)(d)(2) of the Rules of this Court)—there was no error at all, *i.e.*, the receipt of the evidence in question was correct. Cf. *Scales* v. *United States*, 260 F. 2d 21, 38-39 (C.A. 4), pending on writ of certiorari, No. 488, this Term; *Scales* v. *United States*, 227 F. 2d 581, 589-592 (C.A. 4), reversed on other grounds, 355 U.S. 1; *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (C.A. 7), reversed on other grounds, 355 U.S. 2; *United States* v. *Dennis*, 183 F. 2d 201, 231-232 (C.A. 2), affirmed on other issues, 341 U.S. 494.

sary that the *organization*—knowing membership in which is charged—be one whose advocacy of violent overthrow meets the *Yates* test[2] and we do not read the opinion below as questioning this proposition.

Since it is likely that the Court's decision in the *Scales* case will illuminate or be dispositive of most if not all of the questions involved in the present petition (including question 1),[3] it is respectfully suggested that disposition of this petition be held in abeyance pending the Court's determination of *Scales*.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1959.

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[2] It is to be noted that the trial judge charged the jurors that the very first factual finding which they were required to make in order to convict was that the Communist Party of the United States was during the pertinent period a group or society which taught and advocated the forcible overthrow of the Government of the United States in the sense of an urging "to action", by means of "language reasonably calculated to incite persons * * * to use force and violence to overthrow or destroy the United States Government" (Tr. 1252, 1257-1258). The trial judge thus clearly, in substance, directed the jury to apply the *Yates* test to the organization's advocacy.

[3] *Scales* involves, in addition, questions not presented here.

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